

REPORT

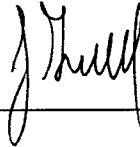
DATE: July 7, 2005

TO: Administrative Committee
Regional Council

FROM: Heather Copp, Chief Financial Officer, (213) 236-1804, copp@scag.ca.gov *hc*

SUBJECT: WRCOG Request for Reimbursement of Indirect Costs

EXECUTIVE DIRECTOR'S APPROVAL:



RECOMMENDED ACTION:

Deny request for reimbursement.

SUMMARY:

In March of 2005, WRCOG submitted invoices in the amount of \$99,947.55 for FY 2001 indirect costs. Included in with the invoice information was a Caltrans approved ICAP for FY 2001. Caltrans approved the ICAP rate of 58.69% on October 13, 2004. This is nearly four years after the close of FY 2001.

In FY 2001, WRCOG billed SCAG for indirect costs. SCAG denied reimbursement for two reasons: 1) WRCOG didn't have an approved ICAP and 2) WRCOG submitted final ICAP related invoices after published deadlines and the fiscal year was closed. WRCOG has been seeking reimbursement for the FY 2001 indirect costs ever since.

OMB A-87 and Generally Accepted Accounting Principles (GAAP) are both applicable on a year to year basis. All direct and indirect overhead costs must be recognized and expensed in the fiscal year the cost benefit is realized. An allowable cost cannot be charged to federal grants in any arbitrary or selectively chosen year, but is only allowable in the year the cost benefit is actually realized.

For these reasons, we are recommending that the request for reimbursement be denied.

BACKGROUND:

In April 2001, the Regional Council (RC) authorized subregions to bill SCAG for their indirect overhead costs under certain conditions. A principal condition was the requirement of an approved cost allocation plan. The RC resolution was consistent with the requirements promulgated by the Office of Management and Budget Circular A-87 (OMB A-87). OMB A-87 requires SCAG and subregions to prepare, submit, and obtain approval of their Indirect Cost Allocation Plan (ICAP). Approval of the ICAP is required before overhead costs can be billed to federal grants in any particular year.

In FY 2001, WRCOG billed SCAG for indirect costs. SCAG denied reimbursement for two reasons: 1) WRCOG didn't have an approved ICAP and 2) WRCOG submitted final ICAP related invoices after published deadlines and the fiscal year was closed. With respect to the lack of an approved ICAP, WRCOG had maintained that they could "self-certify" their ICAP. SCAG staff explained that this is not consistent with either OMB A-87 or Caltrans policy. With respect to the late invoice issue, WRCOG stated they had oral permission from former SCAG staff to turn in these documents late.

REPORT

Since FY 2001, SCAG staff has met several times with WRCOG staff, WRCOG has engaged two legal counsels on this matter, and we have exchanged letters with WRCOG as well. SCAG has consistently maintained that their indirect overhead costs are ineligible because WRCOG did not comply with RC Policy, OMB A-87, and that WRCOG did not comply with SCAG deadlines to submit their FY 2001 invoices.

The following is a brief chronology of events that have occurred over the last four years.

- January 26, 2001: Contract executed, specifies that WRCOG must follow federal and state grant provisions.
- April 24, 2001: Contract amended to provide for the reimbursement of indirects in accordance with all applicable federal and state grant provisions.
- June 18, 2001: SCAG wrote letters to all subregions requiring the subregions to submit invoices for FY 2001 by August 15, 2001.
- July 12, 2001: In a letter to SCAG, WRCOG acknowledged the August 15 deadline.
- **October 16, 2001: WRCOG ICAP plan for FY 2001 was sent to Caltrans, well beyond the August 15, 2001 due date.**
- November 29, 2001: A contract was executed between SCAG and WRCOG again specifying the August 15th deadline for billings.
- **June 6, 2002: SCAG received an overhead billing for FY 2001 for \$144,928.36. The billing was past the August 15, 2001 deadline and Caltrans had still not approved their ICAP so payment was denied.** (The WRCOG claim is now for nearly \$45,000 less than this claim, after WRCOG recalculated their 2001 ICAP in 2005)
- January 30, 2004: WRCOG's attorney sends letter regarding the necessity of FY 2001 ICAP plan.
- March 17, 2004: SCAG's attorney responds with SCAG position on the FY 2001 ICAP plan.
- March 24, 2004: WRCOG's attorney responds to SCAG's March 17, 2004 letter and asks for reimbursement of FY 2001 indirect costs.
- June 18, 2004: SCAG's attorney denies reimbursement request.
- March 15, 2005: SCAG received a letter from WRCOG regarding the submission of outstanding overhead invoices for FY 2001.
- June 15, 2005: SCAG staff meets again with WRCOG administrative and legal representatives. SCAG staff re-iterates its positions with respect to the claim.

REPORT

The WRCOG indirect overhead costs were incurred in FY 2001 and were therefore subject to compliance with RC policy, OMB A-87, and GAAP in that year. Since WRCOG did not comply with the ICAP requirements in FY 2001, their indirect overhead costs are not an allowable cost billable to federal grants in FY 2001. Further, they would not be allowable or billable in FY 2005, nor in any subsequent fiscal year. Caltrans Local Assistance Manual states that "Any completed project with a Final Report of Expenditures will not be eligible for retroactive indirect cost reimbursement." This project was closed in FY 2001 consistent with any other staff funded project.

Please see WRCOG's rebuttal to SCAG's recommendation to deny their indirect costs from FY 2001.

FISCAL IMPACT: HC

Denying the cost reimbursement request would not result in any fiscal impact to SCAG. However, if the Regional Council would consider their request there would be financial impacts to SCAG:

- This request would not be eligible for federal funds; therefore, all reimbursement would have to be made from the General Fund.
- General funds would have to be reprioritized from existing commitments that were approved in the FY 2005/2006 budget. This would have a significant impact on sponsorships, legal costs, etc. as the general fund budget would have to be reduced by 8%.
- A ruling in favor of WRCOG would set a precedent for other subregions with similar claims to come forward and seek reimbursement.

BEST BEST & KRIEGER LLPA CALIFORNIA LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
LAWYERS3750 UNIVERSITY AVENUE
POST OFFICE BOX 1028
RIVERSIDE, CALIFORNIA 92502-1028
(951) 686-1450
(951) 686-3083 FAX
BBKLAW.COM**FILE COPY**SAN DIEGO
(619) 525-1300ORANGE COUNTY
(949) 263-2600SACRAMENTO
(916) 325-4000INDIAN WELLS
(780) 568-2811ONTARIO
(909) 888-8584STEVEN C. DEBAUN
(951) 826-8201
STEVEN.DEBAUN@BBKLAW.COM

June 7, 2005

VIA FACSIMILE AND U.S. MAILKaren Tachicki, Chief Counsel
Southern California Association of Governments
818 West Seventh St., 12th Floor
Los Angeles, CA 90017-3435Re: Recovery of Indirect Costs

Dear Ms. Tachiki:

I am writing this letter on behalf of the Western Riverside Council of Governments ("WRCOG"). As you are aware, WRCOG has submitted a request for the reimbursement of indirect costs for the 2000-2001 fiscal year to the Southern California Association of Governments ("SCAG"), totaling \$99,947.55. SCAG indicates that it will recommend denying the request for reimbursement, as SCAG alleges that WRCOG failed to submit a timely Indirect Cost Allocation Plan ("ICAP"), in accordance with the Continuing Cooperative Agreement ("CCA").

In preparation for our meeting next week, I wanted to provide you with my view of the issue. Although prior letters regarding this dispute focused on Office of Management and Budget Circulars and CalTrans Local Assistance Manuals, the solution lies in the CCA. WRCOG insists that it is, and has always been, in compliance with the CCA. The crux of the dispute lies in whether WRCOG was required to submit its ICAP by August 15, 2001. WRCOG believes that it was not.

First, the CCA, which called for retroactive reimbursement of indirect costs, was not in effect when WRCOG submitted both its request for reimbursement and its ICAP. WRCOG submitted its reimbursement requests by the August 15, 2001 deadline. On October 17, 2001, WRCOG submitted its ICAP. The CCA was not executed until November 29, 2001, more than three months after WRCOG submitted its requests for reimbursement and six weeks after WRCOG submitted its ICAP. Therefore, at the time WRCOG submitted its documentation, there was only proposed language regarding reimbursement procedure. However, after the CCA was approved, WRCOG received oral assurances that it had submitted the proper documentation.

000048

LAW OFFICES OF
BEST BEST & KRIEGER LLP

Karen Tachicki, Chief Counsel
June 7, 2005
Page 2

Second, the construction of the CCA does not support an interpretation that WRCOG was required to submit a CalTrans approved ICAP by August 15, 2001. Section 8 of the agreement relates to the method of payment and progress reporting. Section 8(c) requires that year-end requests for payment are due by August 15th of each fiscal year. This deadline makes no reference to ICAPs. WRCOG submitted its requests by the August 15th deadline.

Section 10 requires the agency to "provide SCAG with a copy of its certified indirect cost plan." The agreement does not clarify what the term "certified" means, nor does it set a timeline for when the plan must be submitted. At no point does the CCA require WRCOG to submit a copy of its CalTrans approved ICAP to SCAG by August 15th.

On October 17, 2001, WRCOG submitted a copy of its ICAP. As such, WRCOG was not in violation of the CCA when it requested reimbursement for indirect costs by August 15, 2001 and submitted a copy of its ICAP at a later date. Further, although it was not required to do so, WRCOG submitted a copy of its CalTrans approved ICAP on March 10, 2005.

Much has been made of a June 18, 2001 letter from SCAG wherein SCAG alleges that it informed WRCOG that it must have all of its paperwork submitted by August 15, 2001. This letter is not evidence of a requirement that WRCOG submit a CalTrans approved ICAP by August 15th. First, the letter does not set a firm deadline. Rather, it states a preference for payment:

Any billing received after August 15, will not be recorded as performed under the Fiscal Year 2000-2001 Budget. Late billings may create a problem in determining where to charge these costs and may result in a significant delay in payment. (emphasis added.)

Additionally, the letter makes no reference to ICAPs; it refers only to billings. Finally, Section 15 of the original agreement between the parties, executed January 26, 2001, provides that any changes to the contract must be mutually agreed to by WRCOG and SCAG and submitted as written amendments to the agreement. The letter from SCAG does not meet these requirements. As such, the letter has no binding effect on either WRCOG or SCAG.

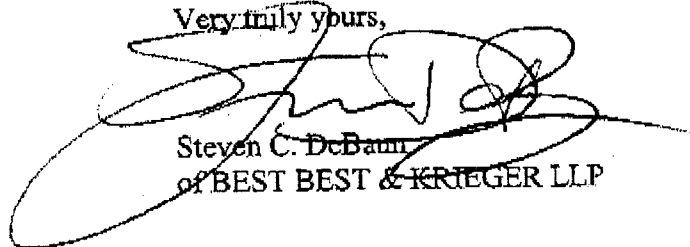
WRCOG has complied with all applicable provisions and is entitled to reimbursement for its indirect costs. WRCOG submitted its billings before August 15, 2001 and submitted an ICAP on October 17, 2001. Moreover, although not required to do so, WRCOG submitted a CalTrans approved ICAP on March 10, 2005. This provides SCAG with all of the documentation it needs to reimburse WRCOG for its indirect costs. As such, WRCOG requests that SCAG approve the reimbursement of indirect costs for the 2000-2001 fiscal year, totaling \$99,947.55. WRCOG is willing to discuss this matter further with SCAG to reach a mutually beneficial resolution.

LAW OFFICES OF
BEST BEST & KRIEGER LLP

Karen Tachicki, Chief Counsel
June 7, 2005
Page 3

I look forward to discussing this issue further with you next week.

Very truly yours,



Steven C. DeBarr
of BEST BEST & KRIEGER LLP

SCD:WAD

cc: Mr. Rick Bishop, Executive Director
Ms. Ruthanne Taylor Berger, Deputy Executive Director
Mr. Scott Higginbotham, Controller

RV\PUB\WAD\694793.2

000050